

**CRITIQUE OF WILLIAMSON'S ECONOMIC CASE
FOR AN EFFICIENCIES DEFENSE IN ANTITRUST
MERGER ANALYSIS:
THE RECTANGLES ARE RARELY LARGER THAN
TRIANGLES AND POLICY PRESCRIPTION**

By

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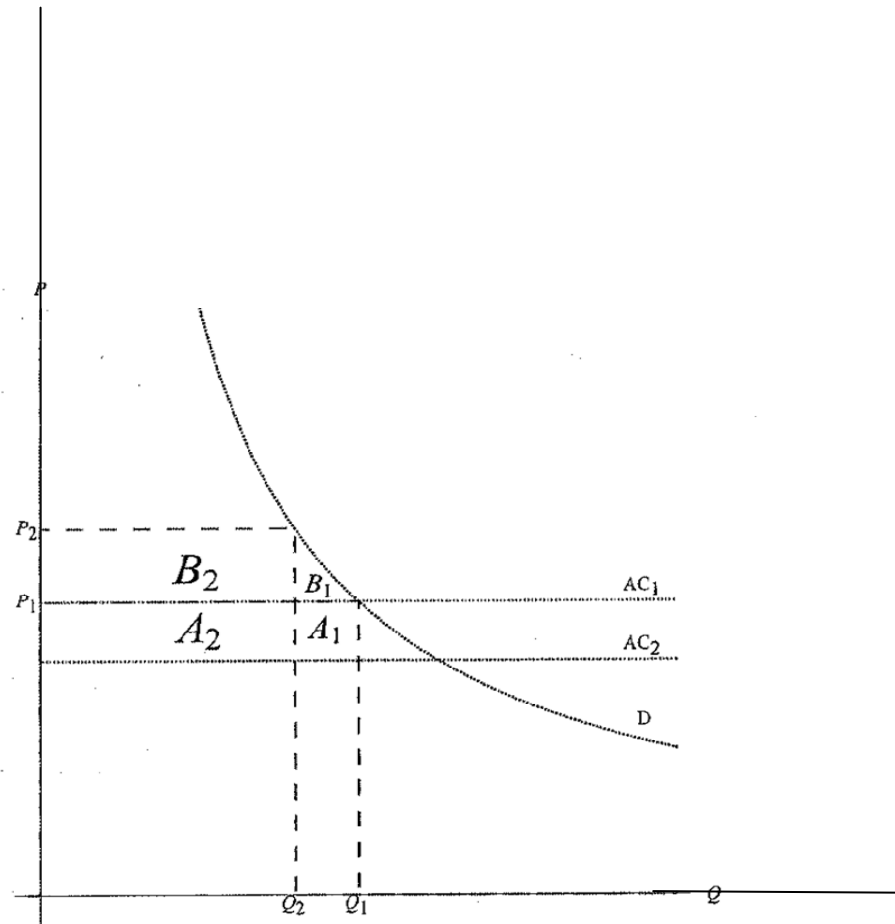
DOJ/FTC Efficiencies Workshop

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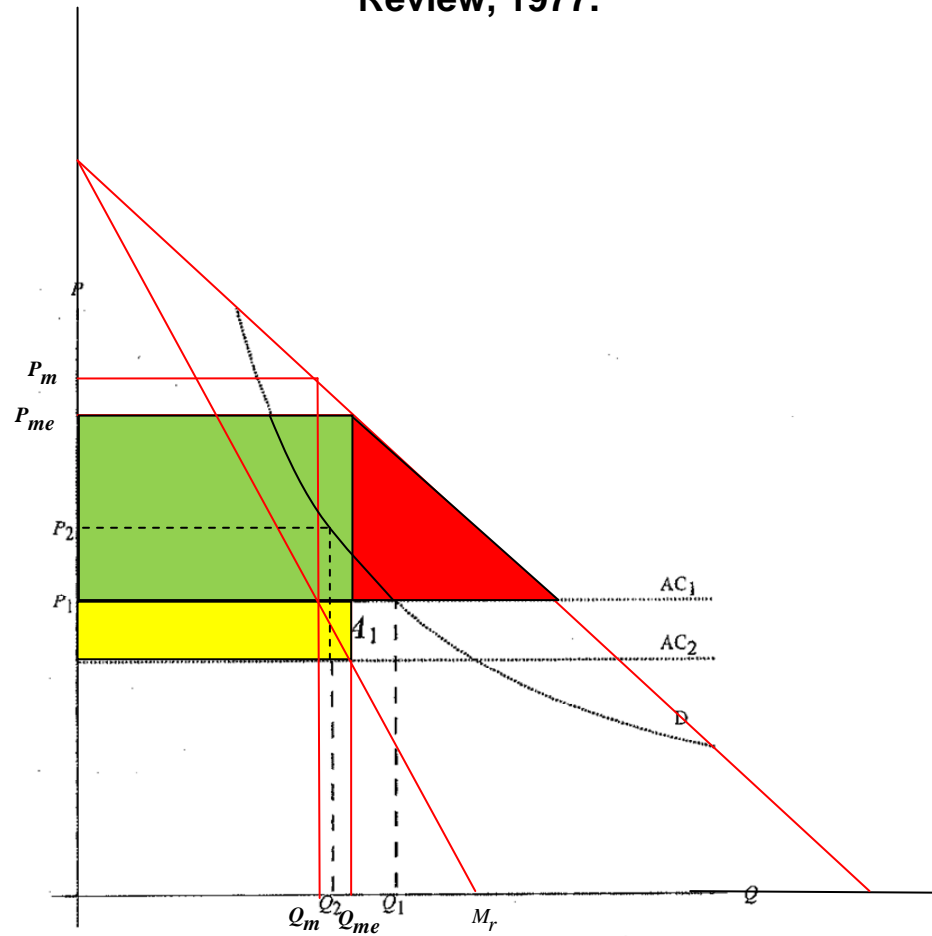
Issue: Under What Circumstances Should Efficiencies Resulting from a Merger Justify a Merger that would Otherwise Violate the Antitrust Law, that is, an Anticompetitive Merger?

- In a 1968 article in the American Economic Review Professor Williamson provided a theoretical justification.
- The DOJ/FTC Merger Guidelines and court cases take a cautious approach.
- Former FTC Chairman Muris and others have argued that Efficiencies should in many cases trump the anticompetitive effect.
- On the basis of the analysis in my paper entitled, *Critique of Williamson's Economic Case for an Efficiencies Defense: The Rectangles are Rarely Larger than the Triangles*, I argue for a continuation of the cautious approach.
- I do not address other objections to an efficiencies defense, such as the Posner view that all of the cost are not reflected in Williamson's ₂ approach.

Efficiencies graph from p. 239 of Ch. 6, Efficiencies, Mergers and Acquisitions: Understanding the Antitrust Issues, 3rd. Ed., ABA Publishing; similar to Williamson graph in American Economic Review, 1968, and the University of Pennsylvania Law Review, 1977.



Modifications of efficiencies graph from p. 239 of Ch. 6, Efficiencies, Mergers and Acquisitions: Understanding the Antitrust Issues, 3rd. Ed., ABA Publishing; similar to Williamson graph in American Economic Review, 1968, and the University of Pennsylvania Law Review, 1977.



Policy Prescriptions (1 of 3)

- In any merger giving rise to a significant increase in market power, the size of the Efficiency Rectangle is not likely to be substantially larger than the consumer (and producer) Welfare Triangles and in many cases may be smaller.
- Thus, the U.S. antitrust authorities should not consider liberalizing the approaches to efficiencies taken in the DOJ/FTC Merger Guidelines.
- The Guidelines have an implicit requirement that the efficiencies must overpower the anticompetitive effect and keep the post merger price from rising. The EU Guidelines provide that in certain cases the parties will have to establish that the efficiencies will be passed on to consumers. At a minimum, the efficiencies should have to keep the post-merger price from increasing, and if there is any doubt that the Guidelines adopt this standard, the doubt should be eliminated by clarifying amendments.
- This standard is most likely to be satisfied when the anticompetitive effects of the merger are small and the efficiencies substantial.

Policy Prescriptions (2 of 3)

- As a way of conserving resources for both agency officials and parties, I suggest that the Guidelines be amended to provide that the antitrust officials will consider efficiencies only in those cases where on the basis of factors other than efficiencies, the officials determine that a decision to oppose the transaction or require a divestiture or other remedy is a close one.
 - If the decision is not close, the officials would not consider efficiencies and the parties would not have to go to the expense of preparing White papers supporting efficiency claims.
 - Only if the officials decided that the decision was otherwise close would the parties be permitted to submit arguments regarding the efficiencies to be realized in the transactions. In such a case, in evaluating the overall transaction the officials would take account of any efficiency claims that satisfied the “merger specific,” “verification,” “cognizable” and “sufficiency” requirements of the current Guidelines.
 - Thus, the submission of efficiency analyzes would be permitted when the officials decided on the basis of an analysis of other factors that there was a significant concern that a challenge to the transaction or a requirement to divest may lead to a Type I error (i.e., a finding that the merger is anticompetitive when it is not).

Policy Prescriptions (3 of 3)

- Given the findings above with regard to the possibility that even significant marginal cost efficiencies may not swamp the Welfare Triangle, it would be appropriate for officials to consider only variable cost savings.
 - In this connection, a 2009 FTC study found that both the Bureau of Competition and the Bureau of Economics at the FTC are as likely to accept fixed costs savings and variable cost savings at about the same rates.
 - Variable cost savings impact price, but fixed cost savings generally do not at least in the short-run. Unless the parties can establish that fixed cost savings will be reflected in price in the reasonable future they should be rejected.